

October 1, 2012

Dyan C. Whyte
Assistant Executive Officer
California Water Boards
San Francisco Bay Regional Water Quality Control Board
1515 Clay St., Suite 1400
Oakland, CA 94612

Re: Letter of July 20, 2012 Requesting Report of Waste Discharge for Lehigh Southwest Cement Company, 24001 Stevens Creek Boulevard, Cupertino, Santa Clara County
CIWWS Place ID: 273205(LW) (Site ID: 2020435)
Client-Matter No. 32606.00092

Dear Ms. Whyte:

This letter responds on behalf of Lehigh Southwest Cement Company ("Lehigh") to your letter dated July 20, 2012 ("Letter"), requesting that Lehigh submit to the San Francisco Bay Regional Water Quality Control Board ("Regional Water Board") a characterization of wastes, if any, that may have the potential to cause pollution or contamination in underlying ground water, in the form of a Report of Waste Discharge ("ROWD") for Lehigh's facility at 24001 Stevens Creek Boulevard, Cupertino, Santa Clara County ("Permanente Facility"). This letter provides information to clarify the relationship between the Letter's requests and existing information or applications previously filed by Lehigh, and sets forth what Lehigh believes to be the appropriate near-term submissions that will accomplish the goals of the Letter. Lehigh requests the opportunity to meet with you to discuss the best path forward to ensure that the Regional Water Board has information of the nature and format needed.

The Letter contains a broad, but very brief, description of the information sought, including *"information related to mining waste discharges and the disposal and/or storage of waste materials placed in the East and West Material Storage Areas and process water surface impoundments from which discharge to waters of the State, including groundwater, might occur."* The letter cites Title 27 requirements, and concludes with a request that Lehigh *"characterize the following, at a minimum:"*

- "1. Waste materials in the East Materials Storage Area;*
- 2. Waste materials in the West Materials Storage Area;*

3. Pond Nos. 4, 9, 11, 13A, 13B, 17, 30, 31A and 31B.”

As you know, extensive information regarding the materials stored in the East Materials Storage Area (“EMSA”) and West Materials Storage Area (“WMSA”) was compiled and presented in connection with Lehigh’s Amended Reclamation Plan for Permanente Quarry (State Mine ID # 91-43-0004) and the related Environmental Impact Report, approved and adopted by Santa Clara County on June 26, 2012 (“Amended Reclamation Plan”). The Regional Water Board reviewed the Amended Reclamation Plan documents, and submitted comments in the County proceedings. The process outlined and suggested below for the EMSA and WMSA builds upon and will supplement the existing information.

In addition, and relevant to the discussion below, all of the listed ponds are regulated under existing waste discharge requirements, and though the Letter requests information on process water ponds, several ponds cited are storm water, rather than process water, ponds (*e.g.*, Ponds 13A, 13B, 30, 31A, and 31B). Most of the listed ponds (all but Ponds 30, 31A, and 31B) are additionally the subject of another pending report of waste discharge (Report of Waste Discharge dated November 30, 2011 for an individual NPDES permit, supplemented by further information submitted May 14, 2012 in response to the Regional Board’s request for more information on March 27, 2012 (“November 2011 ROWD”)).¹

East Materials Storage Area and West Materials Storage Area

Detailed descriptions of the EMSA and WMSA are included in the Amended Reclamation Plan documents previously reviewed by the Regional Board. We draw your attention to the following related sections of the documents:

Draft Environmental Impact Report, December 2011:

Section 2.7.5.11, Utilities (Description of use and management of water, wastewater and stormwater and erosion control).

Section 4.10, Hydrology and Water Quality (Description of surface water and groundwater hydrology and water quality and drainage; includes leachability analyses).

Attachment E: Golder Associates, Hydrologic Investigation, May 2010, Revisions 1.0, November 2011 (Report providing overall characterization of hydrologic conditions, including surface and groundwater quality monitoring).

¹ The November 2011 ROWD was provided as part of Lehigh’s response to detailed requirements in the June 13, 2011 Water Code Section 13267 Order issued by the Regional Water Board to Lehigh, as amended by correspondence dated July 10, 2011 (“June 2011 Section 13267 Order”).

Attachment G: Strategic Engineering & Science, Inc., Reclamation Water Quality, December 2011 (Report describing anticipated effects on water quality, and recommendations for managing water quality as part of reclamation and during interim operational periods).

Final Environmental Impact Report, May 2012:

Response to Comments, pp. 3.2-62 to 3.2-72 (Responses to Regional Board Comment letter dated February 21, 2012, including discussion of characterization of wastes and other water quality issues).

In response to the Letter, and in furtherance of resolving any Title 27 issues at the EMSA or WMSA, Lehigh proposes to provide the Regional Water Board a separate characterization of the materials stored in the EMSA and WMSA, in a format that will facilitate substantive discussions and Regional Water Board review. The characterization will build upon the existing information, providing technical detail to allow confirmation of the appropriate classification of the materials, and to support future regulatory requirements, if any, for these areas. Lehigh has asked its consultant to prepare a workplan for this task, which will be shared with the Regional Water Board no later than December 1, 2012.

Storm Water Ponds (13A, 13B, 30, 31A, and 31B) -- Existing Coverage under the General Industrial Storm Water Permit; Title 27 Exemption

The Letter refers to characterization of wastes in process water ponds, yet lists some ponds that exclusively handle storm water, and are not used for process water storage or discharge. We assume that Ponds 13A², 13B, 30, 31A and 31B were listed in the Letter in error, or to seek clarification of this point from Lehigh. Stormwater discharges from these ponds are covered by the Industrial Storm Water NPDES General Permit (NPDES General Permit CAS000001) ("Industrial Storm Water Permit"), and descriptions of these ponds are included in the Water Balance and Process Diagram Report, dated September 30, 2011, prepared by Geosyntec Consultants and included in Lehigh's response to the June 2011 Section 13267 Order. Please advise if you require further information on this point, such as the facility's Stormwater Pollution Prevention Plan ("SWPPP") or Annual Reports. Ponds 13A and 13B are also dually covered by the Regional Water Board's NPDES General Permit for Aggregate Mining and Sand Washing/Offloading (NPDES No. CAG982001, Order No. R2-2008-0011) ("Aggregate General Permit") as a result of the June 2011 Section 13267 Order.

² Lehigh has recently installed infrastructure at the primary crusher to ensure that any non-storm water flows from crusher operations do not enter Ponds 13A or 13B. Flows to Ponds 13A and 13B will consist of storm water that falls within the footprint of the primary crusher area, which is collected first in concrete sediment basins equipped with an oil/water separator, and then sent to Pond 13A. This is clearly storm water associated with an industrial activity, and not mining waste.

Lehigh is not required to submit a Title 27 ROWD³ for these industrial storm water detention ponds, as the water stored does not fall within Title 27's scope, and an express exemption precludes applicability. A pond is not subject to Title 27 regulations if it meets the exemption criteria set forth in 27 CCR § 20090(b),⁴ which provides a broad exemption for the discharge of wastewater to land as follows:

(b) Wastewater – Discharges of wastewater to land, including but not limited to evaporation ponds, percolation ponds, or subsurface leachfields if the following conditions are met:

- (1) the applicable RWQCB has issued WDRs, reclamation requirements, or waived such issuance;
- (2) the discharge is in compliance with the applicable water quality control plan; and
- (3) the wastewater does not need to be managed according to Chapter 11, Division 4.5 Title 22 of this code as a hazardous waste.

The storm water in Ponds 13A, 13B, 30, 31A, and 31B satisfies each of the criteria for the Section 20090(b) exemption. Section 20090(b) expressly recognizes evaporation and percolation ponds as qualifying for the exemption. As to the criteria, as noted above, the Regional Water Board has issued several WDRs/NPDES permits (Industrial Storm Water Permit and Aggregate General Permit) applicable to these ponds that already address the issues raised in the Letter. For example, the Industrial Storm Water Permit includes express provisions requiring the use of best management practices such as detention ponds, and provisions requiring that discharges not cause pollution of groundwater. Second, the Industrial Storm Water Permit and Aggregate General Permit ensure that covered facilities comply with the applicable Basin Plan. (*See, accord*, California Water Code § 13263(a) (requiring that WDRs implement any relevant water quality control plans that have been adopted)). Third, there is no claim, nor any facts to support, that the storm water at issue is a hazardous waste.⁵ In fact, data generated pursuant to

³ The consolidated solid waste management regulations issued by the State Water Resources Control and CalRecycle's predecessor agency, the Integrated Waste Management Board, are contained within Subdivision 1 of Division 2 of Title 27, titled "Consolidated Regulations for Treatment, Storage, Processing or Disposal of Solid Wastes" ("Title 27 regulations"), 27 CCR § 20005 et seq. Specific Title 27 regulations relating to "mining waste" disposal appear in a special chapter, which begins at Section 22470.

⁴ Section 20090 does apply to mining wastes, pursuant to 27 CCR § 22470(a) (defining portions of Title 27 applicable to mining wastes).

⁵ Another expression of the same basic exemption is reflected in 27 CCR § 20200, within the subchapter (Subchapter 2 of Chapter 3) on Waste Classification Siting and Design. Section 20200 notes that "the division," which would refer to Division 2, will not apply to

the Industrial Storm Water Permit and Aggregate General Permit belies such a finding. Finally, it is only logical, and good public policy, to regulate the storm water that collects in these ponds under the Industrial Storm Water Permit given that use of detention facilities is a customary best management practice favored in the control and minimization of pollutants in storm water, especially in the mining industry. (See, e.g., USEPA's *Industrial Stormwater Fact Sheet, Sector J, Mineral Mining and Dressing Facilities* (EPA 833-F-06-025)⁶). For these reasons, Lehigh does not believe Ponds 13A, 13B, 30, 31A, or 31B should be regulated under Title 27, or be subject to the ROWD requirements detailed in the Letter.

Co-mingled (Actual or Potential) Process and Storm Water Ponds (Ponds 4, 9, 11, and 17) -- Existing Coverage under the Regional Water Board's Aggregate General Permit; Title 27 Exemption

Ponds 4A (which is Lehigh's name for what we assume the Letter refers to as "Pond 4"), 9, 11, and 17 serve as a settling function for either co-mingled storm and process waters (Ponds 4A, 9, and 11) or primarily storm water with a *potential* for co-mingling with process water (Pond 17), that subsequently discharge to Permanente Creek. The water contained and discharged from these ponds was previously regulated by the Industrial Storm Water Permit, is currently regulated by the Aggregate General Permit, and the water is not considered a hazardous waste for the same reasons cited above. Therefore, the exemption under section 20090(b) applies so as to eliminate duplicative permitting requirements. Further, these ponds, and the discharges therefrom, are also the subject of the pending November 2011 ROWD, where impacts to groundwater, if any, will be addressed.

Nonetheless, Lehigh will commit to lining Ponds 9 and 17 during the next dry season, and is currently evaluating whether any further additional liner is appropriate for Pond 11 (Pond 11 is already partially lined). Lehigh further notes that Pond 4A is fully lined, mitigating any potential for impacts to groundwater referenced in the Letter. For this reason, and in addition to the applicable exemption discussed herein, Lehigh does not believe Pond 4A should be referenced further.

"wastes which can be discharged, directly or indirectly (e.g., by percolation) to waters of the state under effluent or concentration limits that implement applicable water control plans (e.g., municipal or industrial effluent or process wastewater)."

⁶ http://www.epa.gov/npdes/pubs/sector_j_mineralmining.pdf ("EPA believes that the most appropriate means of stormwater management at mineral mining and processing facilities are source reduction BMPs. Source reduction BMPs are methods by which discharges of contaminants are controlled with little or no required maintenance. Examples of source reduction controls include diversion dikes, vegetative covers, and berms. These practices are typically low in cost and relatively easy to implement. In some instances, more resource intensive treatment BMPs, including sedimentation ponds, may be necessary depending upon the type of discharge, types and concentrations of contaminants, and volume of flow.")

Please contact me in regards to scheduling a meeting to discuss the information contained in this letter.

Very truly yours,

DOWNEY BRAND LLP



Nicole E. Granquist

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Cc: Lindsay Whalin, Regional Water Board
John Gillan, Deputy General Counsel, Lehigh
Greg Knapp, Director, Environmental Region West, Lehigh